U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 13 December 2004

BALCA Case No.: 2004-INA-19
ETA Case No.: P2002-NJ-02480647

In the Matter of:

RUDOLPH TECHNOLOGIES,
Employer,

on behalf of

UMESH CHANDRA PANT,
Alien.

Appearance: David H. Nachman, Esquire
Upper Saddle River, New Jersey
For the Employer and the Alien

Certifying Officer: Delores DeHaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer of an application for alien employment certification. Permanent alien employment certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and Title 20, Part 656 of the Code of Federal Regulations. We base our decision on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 26, 2001, the Employer, Rudolph Technologies, Inc., filed an application for labor certification to enable the Alien, Umesh Chandra Pant, to fill the position of Software Engineer. (AF 24). A Master's degree in Computer Applications with no experience or a Bachelor's degree and five years of progressive experience were required. The Employer requested a Reduction in Recruitment ("RIR"). (AF 4). The RIR was denied by the CO on March 30, 2002, and the case was remanded to the state agency for supervised recruitment. (AF 32). The Employer conducted recruitment and the case was again forwarded to the CO.

On March 11, 2003, the CO issued a Notice of Findings ("NOF"), proposing to deny certification. (AF 75). The CO determined that out of the thirty U.S. applicants, nine were considered qualified. The CO pointed out that the Employer's basis for rejecting these candidates due to their lack of GUI, Windows SDK and MFC and/or C++ experience could not be regarded as a lawful basis for rejection because that experience had not been mentioned in the ETA 750A. The Employer was advised it could rebut this finding by further documenting specific lawful, job-related reasons for rejecting each of these applicants.

Counsel for the Employer submitted rebuttal on April 11, 2003, which included correspondence from the Employer's human resources department, providing an explanation for the rejection of the U.S. candidates. (AF 90). In his letter, counsel stated that the Employer's business was highly specialized and a review of the academic credentials and backgrounds of the applicants revealed that their education and experience obtained was no longer useful or was not intrinsically tied to the field where the job requirements would be performed. It was the Employer's argument that these applicants did not have the pertinent and reasonable current knowledge required when working with metrology equipment in the semiconductor industry. In order to perform the duties of the position, the Employer contended that the applicants needed relevant experience and educational background to work with Meta PULSE-II, experience in the

semiconductor industry or in-depth related courses and topics, and experience with Digital Signal Processing.

With regard to the specific U.S. applicants, the human resources department wrote letters regarding the rejection of each applicant. All nine applicants were rejected for lacking relevant and recent experience in the semiconductor and metrology field. Two applicants also did not have experience with C++ in the semiconductor industry and one applicant lacked experience in developing software and familiarity with the semiconductor industry.

A Final Determination ("FD") was issued on May 5, 2003. (AF 92). The CO pointed out that the Employer's rebuttal stated that the applicants were rejected for lack of the relevant and recent experience the Employer found to be necessary for the position. However, there was no experience requirement in the ETA 750A and therefore, the rejection of otherwise qualified applicants for lack of experience could not be considered a lawful, job-related basis for rejecting these U.S. applicants.

On May 27, 2003, the Employer filed a Request for Reconsideration and a Request for Review. (AF 104). The Request for Reconsideration was denied on August 1, 2003, and this matter was docketed by the Board on December 5, 2003. (AF 111).

DISCUSSION

With the request for review submitted by the Employer, the Employer has submitted documentation not previously reviewed by the CO. This Board will not consider that material. Our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. §§ 656.26(b)(4), 656.27(c).

The Employer contended that its request for review is based on the grounds that the semiconductor industry is a highly-specialized, fast-paced and rapidly changing field

that requires individuals with highly-specialized knowledge and experience to perform the job duties not normally required of software engineers working in a different industry. The Employer contended that every U.S. applicant was not able or qualified to perform the requirements designated in this highly specialized position. The Employer asserted that it is essential to have engineers who possess relevant and recent experience to perform the minimum requirements associated with the duties required for the position. According to the Employer, individuals assuming the position of software engineer are required to have experience or appropriate academic background to perform the job requirements of researching, designing, and developing computer software systems in conjunction with hardware product development for systems that operate on metrology equipment in the semiconductor industry. The Employer cited case law in support of the argument that it can require experience in specific software applications and in a specialized field or in its products. The Employer also reiterated the arguments made in rebuttal, stating that the applicant must be familiar with and have received relevant and recent experience in the semiconductor industry. The Employer argued that this experience and knowledge is a business necessity.

It should be noted that the latter argument is inapplicable, as it applies to stated requirements found to be unduly restrictive. Such is not the case here. The issue here is that the Employer indicated that no experience in the position was required if the applicant had a Master's degree in computer applications and yet the Employer rejected several applicants who had that minimum qualification, on the basis that they were not qualified. Thus, eight applicants had Master's degrees in computer science, and one applicant had a Master's degree in computer engineering. They clearly met the minimum requirements for the position. The Employer's argument that it is allowed to require experience in specific software applications, specialized fields, or in its products does not negate the fact that no such experience was listed as a requirement anywhere in the ETA 750A. While the job description indicated the field in which the work was to be performed, it did not state that experience in or knowledge of that field was required. *See Texas Instruments, Inc.*, 1988-INA-413 (May 23, 1989) (*en banc*) (where employer

required knowledge of semiconductor devices, the Board found this requirement encompassed the requirement of pertinent, reasonably current knowledge).

Labor certification is properly denied where the employer rejects a U.S. worker who meets the stated minimum requirements for the job. *Exxon Chemical Company*, 1987-INA-615 (July 18, 1988) (*en banc*). It is the employer who has the burden of production and persuasion on the issue of the lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.,* 1987-INA-161 (Dec. 7, 1988)(*en banc*). In the instant case, the nine U.S. applicants met the minimum stated requirements of the position and the Employer's rejection of those applicants was in violation of 20 C.F.R. § 656.21(b)(6). Accordingly, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North

Washington, D.C. 20001-8002

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typed pages. Upon the granting of a petition the Board may order briefs.